Special Report No. 25
September 2004

to the Legislative Assembly
of British Columbia

Broken Glass, Broken Trust

A Report of the Investigation into the Complaint Against the City of Surrey

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Broken glass, broken trust : a report of the investigation into the complaint against the City of Surrey

(Special report no. 25, September 2004, to the Legislative Assembly of British Columbia)

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Executive Summary

This report tells a simple story, a story of broken glass and of broken trust. The glass door was broken by a stone kicked up by a weed-trimmer, operated by a municipal employee. Many of us have paid for broken glass, glass broken by a stone cast up by the lawnmower or by a ball thrown with more enthusiasm than skill. We may not have paid cheerfully, but we have paid because of a sense of fair play and of responsibility to the affected neighbour.

The trust was broken by the local government, the City of Surrey (Surrey), when it failed to recognize either its responsibility in the community or the role of my Office. Surrey chose not to pay because it thinks it is not legally liable. Surrey takes the position that because it treats everyone the same when it refuses to pay any claim that it believes would not win in court, this proves it treats everyone fairly. Not so. Consistency is good, but being consistently wrong is not a good thing. The heart of fair and equitable treatment is to exercise lawful authority in a fair manner, so that having considered the circumstances of each case, similar situations receive similar treatment. It is neither fair nor responsible to refuse to consider and address the merits of individual situations.

I have recommended that Surrey reconsider its practice of paying only on claims which it considers would win in court. I have recommended that Surrey pay the $370 that the person spent to repair his glass door. Surrey has declined to do either.

We do not know how many similar claims have been rejected by Surrey, or the dollar value of those claims. We do know that the fact that other claims have been rejected is no guarantee that those claimants were all treated fairly.

Investigative Process

The ***Ombudsman Act*** provides that we investigate complaints about the administrative actions, omissions, and procedures of government authorities, in this case a complaint that Surrey's refusal to reimburse Mr. M was unreasonable. The ***Act*** provides that we inform the authority of the complaint, and investigate. I am authorized to attempt to settle complaints, and the large majority of complaints in which there is some indication of an unfairness are settled in this way.

In those few cases where an authority and my staff cannot agree on a fair outcome to a complaint, I must consider whether there is reason to begin a formal process leading to findings of unfairness, and recommendations for remediation or for changes to practice. Along the way we continue to consult with the authority, offering opportunities for discussions and meetings with a view to achieving a mutually acceptable outcome for the complaint. Almost all complaints resolve in this way, with the authority agreeing to implement steps which address our concerns. A very small number of complaints, only two in the past five years, do not settle, and I must decide whether it is in the interest of the public to issue a report on those files.

I decided to issue this report because I believe it serves the public interest in three ways. It provides a clear and simple example of the entitlement to fairness. It shows the option to use my Office when a complainant cannot resolve his or her own concern. And it offers the last possibility for a remedy of Mr. M's complaint and a change in Surrey's practice, under the bright lamp of public scrutiny.

The Facts

On June 14, 2001, a municipal worker was using a weed-trimmer to cut long grass on a vacant lot adjacent to Mr. M's office. The office door opened onto a walkway down the side of the lot, just a few feet from where the worker was working. One of Mr. M's employees saw the glass door shatter, and went out to talk with the Surrey worker about the broken glass. The Surrey worker gave her a card with the name of an employee in Surrey's Engineering Department, and told her to contact that person. The Engineering Department sent Mr. M's company a claim form, and they filed a claim, with receipts for $370 spent to replace the lettered-glass in the door.

Surrey acknowledged receiving the claim, but a second letter sent in October 2001 denied the requested costs. That letter noted: "*Since Council policy requires that we pay for claims only when there is legal liability, we are unable to pay this claim.*" Mr. M's company disputed this standard of "legal liability only" in a letter in which it encouraged Surrey to take responsibility for the damage. This led to another reply in which Surrey stated that "*courts have found that municipalities are not expected to be perfect when performing their work; but rather they must take reasonable precautions to prevent injury and damage…..there is no negligence on the part of the City and we are unable to pay your claim.*"

Nowhere in this process did Surrey deny that the weed-trimmer cast the stone which broke the glass. Nowhere did Surrey dispute that Mr. M had spent $370 to repair damage resulting from this event. Surrey simply relied on the fact that its worker was "*cutting away from the building*" and that a guard was installed on the machine. Surprisingly, Surrey appeared to be asserting that while its worker broke the glass, it was not Surrey's fault.

Mr. M was not satisfied. He talked with his company's lawyer, filled out the forms to begin a Small Claims Court action and told Surrey he would be going to court, but decided instead to complain to my Office in February 2002.

We contacted Surrey at the beginning of April to give notice of this complaint and to invite Surrey's information and comment on the alleged unfairness. We repeated that request in writing in August, since the only response from April to August had been that Surrey was waiting for information from the legal department. Surrey replied, very briefly, and offering no suggestion that it was open to discussion of the issue. That letter of Sept 20, 2002,

referred to the "*alleged*" incident, without actually denying or acknowledging that the weed-trimmer cast the stone. The letter states that Surrey took "*all reasonable efforts….to provide the duty of care expected in the carrying out of this job…and the City is, therefore, not liable for damages.*" The letter goes on to suggest that Mr. M can "*pursue his claim against the City through the normal processes.*"

At best, this response was not welcoming Mr. M's complaint or our Office's involvement. The letter seemed to suggest that if the event occurred as asserted, then Mr. M should go to court, while at the same time noting that Surrey was of the opinion he would not win and that Surrey would not offer reimbursement for this reason. At worst, the letter suggested firstly that Surrey was unaware of, or perhaps choosing not to address, the role of my Office in reviewing complaints where fairness, not legal liability, is the yardstick. Secondly, the letter suggested that Surrey was not considering the fairness of its own behaviour.

Things did not improve. My investigator wrote to Surrey in October asking for consultation and clarification. Three months later the only clarification was that Surrey specifically suggested that Mr. M's remedy was to proceed in court, again ignoring Mr. M's legislative option to proceed by complaint to my Office.

At that point, in February 2003, I wrote to Surrey's Mayor asking for a meeting to discuss the complaint and Surrey's reasons for its position. By letter from its lawyer, Surrey declined to meet, though it did provide clarification of its position. Leaving aside, at least for now, the refusal to meet to talk with me, Surrey's explanation for not seeing any purpose in a meeting was discouraging. Surrey's lawyer wrote that "*the City will not accept responsibility for a claim unless it is the judgement of Risk Management and legal staff that the City would be held legally responsible for the injury or damage…The City has treated Mr. M [name in full in original] fairly….Mr. M has been treated in the exact same manner as any other person in the same position….The City's claims settlement policy is a commitment to a process that is fair and consistent to all, ensuring that claims are not paid for reasons other than legal liability. Not only does this afford fairness to persons seeking compensation…but also ensures fairness to all taxpayers of the City.*"

Simply put, Surrey was saying that they would only pay if they thought they would lose in court, that those who disagree could take the matter to court and that this is fair because Surrey's response is the same for every person in a similar situation.

It is true that one of the measures of fair practice is consistency, but we all recognize that being wrong or unfair all the time is not a good defense. Consistent application of good policy is a different thing. Good policy will prescribe action within an authority's legal mandate and in keeping with administrative fairness. Good policy will structure the discretion for decision-making (but will allow the full range of decisions possible within the law) by consideration of the circumstances of each case. In this way like cases receive like decisions, but unlike cases may not.

Whether or not Surrey can argue that consistency is a necessary (if insufficient) virtue in its policy, the reply by Surrey's lawyer begged the question of fairness. It did not give us any reason, other than the conservation of fiscal resources, why fairness should be related to refusal of all but compelling legal claims. Surrey never answered the question: how is it fair to Mr. M that he had to pay to replace his own door when he knew full well who broke it and had asked for reimbursement?

Looking for a way around this impasse, I wrote to the Mayor of Surrey with a copy to each Councillor, laying out my initial interpretation that the City had failed to consider all relevant factors in reaching a decision on Mr. M's claim. The letter said that I was considering recommending that Surrey reconsider its decision. It seemed that Surrey's policy to offer payment only for claims that it believed would win in court failed to consider other relevant and at times compelling considerations - considerations such as responsible governance, community standards for behaviour or the existence of hardship resulting from a claim. Fair decision-making occurs when these kinds of individual circumstances are weighed and are addressed in a decision.

Fairness occurs in the zone between one-size-fits-all and made-to-measure decision-making, when everyone knows the criteria, everyone has a reasonable chance to be heard, every decision considers all relevant factors, and every decision is explained.

My letter went out, and then I waited. My staff continued to talk with Surrey, trying to move things along to the point where we would see the other's viewpoint more clearly, without success. We did not seem to be communicating at all. Surrey interpreted the suggestion that it was responsible for damage done by an employee on the job as a request for a "subjective step" which "would make the process inherently unfair because it is not possible to apply consistent criteria to a subjective decision-making process." This response suggests somehow that the chance of winning in court can be assessed objectively, but the chance that Surrey's actions cost Mr. M money cannot.

Trying one more time, I wrote to Surrey in January 2004, repeating my concerns and again asking to meet. I noted that I would move to formal findings, and perhaps a public report, if we could not reach an understanding on this file. I suggested that I would regret to have to report that Council refused even to meet with me.

So we met, without achieving any form of understanding. In the spirit of fairness I have included in this report [as appendices] both my own report to Surrey finding Surrey to have acted unfairly and Surrey's response. Those who want the full version may read the reports. The short version is that Mr. M is out $370, and so is the next person to whom this happens, so long as it happens in Surrey.

Howard Kushner
Ombudsman
Province of British Columbia

Appendices

- Report of the Ombudsman to the City of Surrey, pursuant to s. 23 of the ***Ombudsman Act***, dated April 27, 2004*
- City of Surrey's response, dated May 21, 2004*

* Note that the complainant's name and the names of persons representing the City of Surrey have been deleted in these documents, to preserve privacy.

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*Pursuant to s.9 of the **Ombudsman Act**, this letter, any accompanying document, and any response to either the letter or accompanying document must not be publicly disclosed unless the Ombudsman determines otherwise. Furthermore, these records are excluded from the **Freedom of Information and Protection of Privacy Act** (para. 3(1)(c)) and must not be disclosed pursuant to an FOI request without the express permission of the Ombudsman. Any wilful disclosure of this letter, any accompanying document, and any response to either the letter or accompanying document, may be regarded as an offence under the Ombudsman Act, and may be subject to prosecution pursuant to s.32 of the Act.*

April 27, 2004
File: 02-33629/BR

His Worship Douglas McCallum &
City Councillors
City of Surrey
14245-56th Avenue
SURREY BC V3X 3A2

Dear Mayor McCallum and City Councillors:

Re: Complaint by Mr. M ..... about the City of Surrey (the "City")

I am writing further to the City's February 11, 2004 letter clarifying the City's position on this matter. I would like to thank you and City Councillors for meeting with me on February 9, 2004. Regrettably, the City was not willing to resolve this matter. This letter provides the City with my formal findings and recommendations. It also forms the basis of a public report I plan to issue on this investigation, outlining the concerns that came to light in the course of the investigation. As the City may not be familiar with the Ombudsman's process at this level, I will provide a brief summary of what the City can expect now that I have concluded my investigation.

Ombudsman Process at Conclusion of an Investigation

Upon completion of an investigation, the Ombudsman has broad powers to make findings and recommendations. The grounds for making these findings are set out in section 23 (1) of the ***Ombudsman Act***. This letter is written pursuant to section 23 (1) of the ***Ombudsman Act,*** which reads as follows:

> **23** (1) If, after completing an investigation, the Ombudsman is of the opinion that
> (a) a decision, recommendation, act or omission that was the subject matter of the investigation was
> (i) contrary to law,
> (ii) unjust, oppressive or improperly discriminatory,

(iii) made, done or omitted under a statutory provision or other rule of law or practice that is unjust, oppressive or improperly discriminatory,
(iv) based wholly or partly on a mistake of law or fact or on irrelevant grounds or consideration,
(v) related to the application of arbitrary, unreasonable or unfair procedures, or
(vi) otherwise wrong,

(b) in doing or omitting an act or in making or acting on a decision or recommendation, an authority
(i) did so for an improper purpose,
(ii) failed to give adequate and appropriate reasons in relation to the nature of the matter, or
(iii) was negligent or acted improperly, or

(c) there was unreasonable delay in dealing with the subject matter of the investigation,

the Ombudsman must report that opinion and the reasons for it to the authority and may make the recommendation the Ombudsman considers appropriate.

(2) Without restricting subsection (1), the Ombudsman may recommend that
(a) a matter be referred to the appropriate authority for further consideration,
(b) an act be remedied,
(c) an omission or delay be rectified,
(d) a decision or recommendation be cancelled or changed,
(e) reasons be given,
(f) a practice, procedure or course of conduct be altered,
(g) an enactment or other rule of law be reconsidered, or
(h) any other steps be taken.

R.S.B.C. 1996

If it appears to the Ombudsman that there may be sufficient grounds for making a finding or recommendation, the Ombudsman, before deciding the matter, will inform the authority of the grounds and provide the authority with the opportunity to respond either orally or in writing. If recommendations are subsequently made, the authority will be required to notify the Ombudsman of the steps taken or proposed to be taken to give effect to the recommendations, or to provide the reasons for not following the recommendations. At this point, the Ombudsman may either modify the recommendations or, if no action is taken that the Ombudsman believes adequate or appropriate, the Ombudsman, after considering any reasons given by the authority, may submit a report to the Lieutenant Governor in Council and, after that, may make a report to the Legislative Assembly respecting the matter. Separate from any report the Ombudsman may submit as a result of an authority failing to take adequate and appropriate action to give effect to recommendations, if the Ombudsman considers it to be in the public interest, the Ombudsman may make a special report to the Legislative Assembly or comment publicly.

As indicated above, once you receive my recommendations, you will be required to notify me of the steps taken or proposed to be taken to give effect to the recommendations, or to provide the reasons for not following the recommendations. This letter also serves to notify you that I plan to issue a public report on this investigation. The public report will be issued pursuant to section 31 (3) of the ***Ombudsman Act***. Section 31 (3) reads:

> **31** (3) If the Ombudsman considers it to be in the public interest or in the interest of a person or authority, the Ombudsman may make a special report to the Legislative Assembly or comment publicly about a matter relating generally to the exercise of the Ombudsman's duties under this Act or to a particular case investigated by the Ombudsman.
>
> R.S.B.C.1996

Background

On the afternoon of June 14, 2001, a City worker was using a [weed-trimmer[1]] in front of Mr. M .....'s business premises at .....Avenue, Surrey. The [weed-trimmer] threw a rock, which hit the glass door of Mr. M .....'s business, breaking the glass. In his Notice of Claim (the "claim") to the City, dated June 28, 2001, Mr. M ..... indicated that the estimated cost for replacing the glass door was $229.31, and the estimated cost for replacing the signage on the door was $140.80, for a total claim of $370.11.

The City's Risk Management Clerk informed Mr. M ..... by letter dated October 2, 2001, that his claim was denied because Council policy was *"to pay for claims only when there is legal liability"*. Mr. M ..... requested that this decision be reconsidered. A few days later, by letter dated October 10, 2001, the Manager of Risk Health and Safety Division responded to Mr. M ..... stating, *"In the circumstances there is no negligence on the part of the City and we are unwilling to pay your claim."*

Mr. M ..... contacted the Office of the Ombudsman on February 19, 2002, as he considered it unfair for the City to refuse to compensate him for the broken glass door.

Our Investigation

On April 4, 2002, Ms. Rosanna Stall, Ombudsman Officer, provided notice of the complaint pursuant to section 14 (1) of the ***Ombudsman Act***, to the City Manager, Ms. A....., by telephone.

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[1] The original document referred to a particular brand of weed-trimmer, but the brand is not relevant to this complaint and the Office of the Ombudsman is not certain of the brand used in any event. As such, in this report, we refer simply to "weed-trimmer".

Ms. A..... wrote to Ms. Stall stating that the City does not consider itself liable because reasonable efforts were undertaken to provide the duty of care and, therefore, the City was unwilling to compensate Mr. M ..... for the damage to his property. As further reason, the City Manager stated that the City was concerned that if it allowed this claim, there might be a flood of similar claims which could be costly to the City. However, no specific information was provided as to the number of potential claims the City anticipated it might receive or the cost of paying out such claims.

On February 27, 2003, I wrote to you stating that I remained concerned about the City's response to this complaint. In particular, I questioned the City's apparent exclusive focus on its legal liability, and the apparent lack of consideration given to its duty of fairness. I suggested that it might be beneficial to meet with you and Council to discuss this matter. I made this proposal pursuant to section 14 (2) of the ***Ombudsman Act*** in our continuing effort to resolve the complaint.

On March 24, 2003, the City Solicitor, Mr. B....., wrote to me stating that the City had reviewed the circumstances of the complaint and had concluded that the City had no legal liability. He referenced City policy, which denies responsibility for all claims unless it is the opinion of staff that the City would be held legally responsible for the injury or damage. In his letter, Mr. B..... indicated that since Mr. M ..... had been treated in the same manner as any other person in the same situation, the City has acted fairly. Mr. B..... also stated that Mr. M ..... had the court process available to him as a remedy, and he advised me that you were declining my invitation to meet to discuss this matter.

In light of the above circumstances, by letter dated June 3, 2003, I wrote to you pursuant to section 17 of the ***Ombudsman Act***. This section of the legislation sets out the Ombudsman's procedure after conducting an investigation of administrative unfairness. My tentative recommendations were that the City provides an apology and financial compensation to Mr. M ..... for his property damage, and that the City reviews its policy regarding such complaints. I copied that letter to the City Councillors, as section 17 provides a process for the Ombudsman to inform the authority and other affected parties of possible grounds for making a recommendation under the ***Ombudsman Act***.

Subsequent to my letter of June 3, 2003, there were various telephone conversations, further exchanges of correspondence between my Office and the City, a meeting between the City's Risk Manager and my staff and, eventually, a meeting between City Council, my staff and myself on February 9, 2004.

Our meeting on February 9, 2004 was an opportunity to engage in an open discussion to address the broader issues relating to this complaint and to attempt to reach a resolution. During our meeting I clarified that my Office's investigations focus not only on whether an authority is legally liable but also on whether the authority's decision meets the Ombudsman's standards of fairness. Unfortunately, City Council was not prepared to engage in a full, frank, and open discussion regarding this matter and, instead, limited the discussion. From the brief exchange that did occur, it would appear that the City of Surrey has a very limited view of fairness issues and seems to focus its responses on simply demonstrating that its policy has been followed and consistently applied. City Council also reiterated the concern that if it allowed this claim, there might be a flood of similar claims, which could be costly to the City.

Comments

With respect to the City's insistence that there is no unfairness if its policy has been followed, the fact that the policy exists and is adhered to does not necessarily mean that it is fair. As well, the fact that a policy is consistently applied doesn't necessarily mean that the application is fair in all situations. In fact, an important aspect of fairness is the exercise of discretion, where an authority ensures that it considers each case on its own merit in applying policy.

With respect to the City's concern about a possible flood of similar claims, clearly those cases where it is obvious that the City caused damage to a person's property would be different from those where the circumstances are not clear or where there is little evidence of a clear link to the actual cause of the damage. From a fairness perspective, if a reasonable person, after reviewing the evidence, could conclude that the City caused the damage, it would be appropriate for the City to compensate for the damage, whether or not doing so would create a precedent. It would also be inappropriate, from a fairness perspective, for the City to not compensate for the sole reason that addressing the unfairness may create a precedent. My Office cannot accept that an unfairness will not be addressed because others who may have been treated equally unfairly have not had the unfairness addressed. My Office remains interested in knowing the specific number of those cases where the City was responsible for damages and refused to pay compensation because of its perception that it would not be held legally responsible. The City has not provided this information to my Office. We would hope that there are not a large number of such cases.

During our exchange of correspondence, the City advised, "the clearly defined settlement process that is followed for all claims is fair not only to the people who submit claims but also to the citizens of Surrey whose monies pay the claims." Mr. C....., Risk Manager, in his June

24, 2003, letter to this Office also commented on the purpose of the policy, stating, "This Policy ensures that all claimants are treated in an equitable and fair manner." During our meeting, Council also commented that the money saved in denying claims similar to Mr. M .....'s claim benefits the citizens of Surrey. Clearly, I disagree with Council's position that the application of its current policy in Mr. M .....'s case is of benefit to him. On the contrary, the policy provides for an unreasonable procedure in that it fails to achieve the purpose for which it was established. Further, I believe that any reasonable person in a similar situation whose property was damaged by another person, whether that person was a neighbour or a City worker cutting a lawn or [weed-trimming], would expect that person or the agency that person works for to pay for the damage, either directly or through an insurance policy. You have failed to convince me that the citizens of Surrey, if found in the same situation as Mr. M ..... and having their glass door broken by a City worker using a [weed-trimmer], would agree with you that it is fair for the City to decide not to compensate for the cost of repairing the damage.

During my meeting with City Council I suggested that the neighbourly thing to do would be to offer to pay the $370.11, noting that this is how similar matters could be expected to be resolved between two parties. Unfortunately, Council does not view this as a matter that needs to be resolved. I note that the City Council suggested some alternatives: a person could use their own house insurance and/or a person could initiate court action in order to remedy the matter. The suggestion that a person should use his or her own insurance to cover damage costs directly related to the actions of the City of Surrey lacks reason. To start with, a person would most likely have an insurance deductible and many home insurance deductibles today are between $200.00 and $500.00. As well, making a claim on home insurance may impact a person's premiums depending on their claims history. But more importantly, it is unreasonable to expect a person to use his or her house insurance to cover damage to property in situations where the damage is caused by the City of Surrey.

With respect to the City's suggestion that Mr. M ..... could take the City to court, given that the City caused the damage and that the costs of $370.11 to resolve the matter are relatively minor, and also considering the potential costs involved in court proceedings, I certainly understand why Mr. M ..... initially considered it unnecessary to go to court, and later, when the City refused to settle the claim, was of the view that it was not worth pursuing in court. I also have to question the sincerity of the City's suggestion that Mr. M ..... could attempt to remedy the claim in court, given that the City's risk management and legal staff have already clearly taken the position that the City would not be held legally responsible.

Moreover, the very existence of the ***Ombudsman Act*** speaks to the government's commitment to provide individuals with the opportunity, in addition to existing provisions such as internal complaints procedures and the Judiciary, to place complaints about the practices of government before this Office. Although our Office conducts investigations with a view to government action or inaction as it relates to the written law, including provisions governing procedure and process, of equal importance is investigation of the action or inaction in view of the unwritten legal principles contained in case law and legal doctrine, which include the principles of, for example, reasonableness, the doctrine of certain duties of care and the requirement to provide reasons for decisions. When considering standards for good governance that contribute to fair public administration, my Office is mandated to apply standards of a broader duty of care, such as is encapsulated under section 23 of the ***Ombudsman Act.*** This broader duty of care can include, for example, issues such as acting without undue delay, supplying individuals with relevant information, treating people fairly and respectfully, and acting in an unbiased manner. I also add that given the City's clear statement that it would not be held legally responsible in this case, Mr. M .....'s decision to complain to the Office of the Ombudsman instead of seeking a court remedy was certainly an appropriate decision.

Systemic Concerns

At this point I will respond to some comments that the City has made in the course of this investigation. These comments raise systemic concerns for my Office as they suggest to me that the City lacks sufficient understanding of appropriate standards of fairness. As noted above, Mr. B..... indicated in his March 24, 2003, letter that since Mr. M ..... had been treated in the same manner as any other person in the same situation, the City had acted fairly. In my opinion, if other people in the same situation as Mr. M ..... were treated in the same manner as Mr. M ....., it may be that other people have also been treated in an unfair manner. As indicated earlier in this letter, it is my hope that this is not a large group. Unfortunately, the City has not provided specific information to clarify how many citizens of Surrey have been treated in this manner. Accordingly, I am considering including in my public report of the investigation into this complaint a statement advising any citizens of Surrey who have been treated in a manner similar to that of Mr. M ....., and who have not taken the matter to court, to contact the Office of the Ombudsman for our Office's review on whether we would consider investigating the matter further.

Another area of systemic concern came to light following the Office of the Ombudsman's suggestion that the City's claims settlement policy be revised to include a standard of fairness that would go beyond simply focussing on legal liability. In response to our suggestion, the City (Mr.

C..... in written correspondence) stated that an additional step in the policy to deal with fairness is a subjective step that "would make the process inherently unfair because it is not possible to apply consistent criteria to a subjective decision making process." Unfortunately, during the February 9, 2004, meeting Mr. B..... reiterated the same position. I fail to see the logic in how introducing a more rigorous standard of fairness in the application of a particular policy would make it inherently unfair. In my view this kind of statement appears to indicate an insufficient understanding of the reasonable standards of fairness the public should be able to expect from the City, standards which my Office is mandated to uphold. The policy in its current form certainly makes it easy for the City to deny a group of claims without carefully considering what is actually fair in each case. While this may save the City money, the policy fails to include an appropriate standard of fairness and, rather, appears to have been designed for the mere convenience of the City at the expense of ensuring this appropriate standard of fairness to its citizens.

Concluding Remarks

Prior to confirming my findings and making my recommendations, I will comment on the nature of some of the statements made by the City at the conclusion of the meeting on February 9, 2004, statements that I considered to be particularly troubling. I found the comments to the effect that nobody had actually seen the rock hit Mr. M .....'s glass door, and that it had not been proven that the rock, if it existed, had been thrown by the [weed-trimmer], to represent an inappropriate attempt to dispute what has been readily accepted by City staff throughout the duration of this investigation. While I could certainly subpoena and examine on oath any City staff person involved in the incident, and any person who has reviewed the matter or has knowledge of the incident, I have determined that it is not necessary to do so. I believe that my Office has a clear understanding of what caused the damage to Mr. M .....'s glass door.

Also, I found the comment made at our February 9, 2004, meeting to the effect that the Office of the Ombudsman is without jurisdiction to investigate this complaint to be unwarranted and clearly unsupported. It concerned me to discover that during the entire investigative process the City did not think it appropriate or necessary to raise the issue of jurisdiction with my Office. To make this statement at this late date in my Office's investigation would suggest a failure upon the City's part to understand the legislated role of my Office, which is to provide individuals with the opportunity to place complaints about the practices of government, including local government, before an independent and expert body. Further, this statement appears to dispute what has been readily accepted by City staff throughout the course of our investigation.

Finally, it concerns me that the City was not prepared to ensure that it responded to Mr. M ..... in a fair manner by agreeing to the earlier suggestions and tentative recommendations made by the Office of the Ombudsman or to provide a reasoned basis to refuse. Unfortunately, the City appears unwilling, or unsophisticated from the perspective of fair public administration, to recognize and respect the mandated role of the Office of the Ombudsman. The Office of the Ombudsman was created by the Legislative Assembly and was specifically granted jurisdiction over municipalities and regional districts. It is mandated to ensure fair administration, with the expertise to recommend avenues to resolve complaints where there is unfairness.

Regrettably, rather than agreeing to the earlier suggestions and tentative findings made by the Office of the Ombudsman, the City, at a very late stage in the investigation during the February 9, 2004, meeting, engaged in what appeared to be superficial efforts to avoid having to respond in a fair manner. This accordingly has led to formal findings and recommendations, along with the planned release of a public report. This public report will provide the public with an understanding of the fairness concerns that became evident during the course of my investigation into the City of Surrey.

Standards of Fairness Applied

The following standards of fairness have been applied in this investigation:

Arbitrary Procedure (s.23 (1)(a)(v))

An authority invokes or utilizes an arbitrary procedure when it uses a procedure which fails to adhere to relevant principles of natural justice and which is designed for the mere convenience of the authority or is based on preference or prejudice.

Unreasonable Procedure (s.23 (1)(a)(v))

An unreasonable procedure is one which fails to achieve the purpose for which it was established. This test focuses on the rationale for a procedure and the results it produces or is likely to produce. The term may be seen as a synonym for an incompetent procedure on the basis that such a procedure is an absurdity and thus contrary to reason.

Unfair Procedure (s.23 (1)(a)(v))

Good faith and an open mind are qualities of the decision-maker which are essential to maintaining the integrity of public administration. The decision-maker should not have any "interest" in the outcome of the decision nor should s/he show any pre-judgement of the issue to be decided.

Findings and Recommendations

I remain concerned about the issues raised with the City during this investigation, issues regarding both the individual resolution and the broader systemic problem identified in the City's process of denying responsibility except for "legal" liability. In particular, I question the City's exclusive focus on legal liability, without regard to fairness.

The information considered in the course of this investigation has led me to conclude that the City's claims settlement policy provides for an unreasonable procedure in that it fails to achieve the purpose for which it was established. While it may ensure that all claimants are treated in an equal manner, it certainly does not ensure that all claimants are treated in a fair manner.

I have also concluded that the City's claims settlement policy fails to include an appropriate standard of fairness that goes beyond simply focussing on legal liability. Rather, the policy appears to have been specifically designed with a limited focus for the mere convenience of the City.

I have also determined that the City's insistence that City staff consider only the perspective of legal liability without considering the broader fairness issues involved in each individual claim results in staff failing to consider claims with an open mind. Rather, City staff has demonstrated a particular bias in the outcome of those claims where they have determined that every claim must rest on legal liability.

In light of the above, I am making the following findings:

I find that the City's decision to deny Mr. M .....'s claim is related to an arbitrary, unreasonable and unfair procedure, and, as such, offends subsections 23 (1)(a)(v) of the Ombudsman Act.

Further to my findings, I am making the following recommendations:

> ***That the City reconsiders its decision to deny Mr. M .....'s claim for damage to his property, provides an apology and full financial compensation to Mr. M ..... for his property damage, and undertake to review its policy regarding such complaints in order to ensure that the policy includes a more appropriate standard of fairness.***

In closing, pursuant to section 24 (1) of the ***Ombudsman Act,*** I am requesting that you notify me within 30 days of the date of this letter of the steps the City proposes to take to give effect to the recommendations. Section 24 (1)(a) reads as follows:

> **24** (1) If a recommendation is made under section 23, the Ombudsman may request the authority
> (a) to notify the Ombudsman within a specified time of the steps that have been or are proposed to be taken to give effect to the recommendation, or
> (b) if no steps have been or are proposed to be taken, the reasons for not following the recommendation.
>
> R.S.B.C. 1996

While you are not required to comment further, except to advise of the steps taken to give effect to the recommendations, I will consider any response from the City to this letter prior to issuing my public report, provided the response is received within 30 days from the date of this letter.

Yours truly,

Howard Kushner
Ombudsman
Province of British Columbia

OFFICE OF THE MAYOR

SURREY
CITY OF FARMS

May 21, 2004

File: 0670-01/0410-20
XC 5400-80-07200/#2

VIA FAX (250) 387-0198

Howard Kushner, Ombudsman
Province of British Columbia
756 Fort Street
PO Box 9039 Stn Prov Govt
Victoria, BC V8W 9A5

Dear Mr. Kushner:

Re: Complaint by Mr. M about the City of Surrey (the "City")

The City is writing in response to your letter of April 27, 2004 advising the City of your formal findings and recommendations and providing the City with an opportunity to comment and advise of the steps taken by the City to give effect to your recommendations.

It is our understanding that you have now completed your investigation and have made certain findings and recommendations pursuant to Section 23(1) of the *Ombudsman Act*, R.S.B.C. 1996, c. 340 (the "*Ombudsman Act*").

In summary, the Ombudsman has found that the City's treatment of Mr. M has been unfair and, in particular, takes issue with the City's policy of only paying claims when there is a belief by the appropriate City staff that the City would be legally liable for the claim.

Background

Mr. M complained to the Ombudsman when the City refused his claim for damages he alleges were caused by a City worker. The City's decision to refuse Mr. M's claim was based on its investigation and application of the City's claims settlement policy, which was adopted by Council on October 14, 1997 and has been consistently applied since. The policy provides, in part, that the City does not accept responsibility for a claim unless it is the judgment of risk management or legal staff that the City would be held legally responsible for the injury or damage.

In this instance, the City's risk management staff conducted a full investigation of the claim and also sought a legal opinion as to whether or not the City would be found legally liable for the damages. The legal opinion provided to Risk Management was that the City would not be held legally responsible. Based on the investigation and assessment of the claim, Mr. M's claim was refused.

History

- On June 28, 2001, Mr. M requested reimbursement from the City for an incident alleged to have occurred on June 14, 2001. After a full investigation and after seeking a legal opinion from in-house counsel, the Risk Management Division refused the claim.
- In October of 2001, the Risk Manager reconsidered the claim at Mr. M's request and again refused it. Mr. M was advised that if he disagreed with the City's decision he could seek damages in Small Claims court.
- In April of 2002, an Ombudsman Officer verbally contacted the City to advise of Mr. M's complaint about the City's handling of his claim.
- After a number of discussions, the City confirmed its position in writing to the Ombudsman's office on January 20, 2003, advising that Mr. M's claim had been denied because the City had met the requisite duty of care. The City declined to provide a copy of its legal opinion, as had been requested by the Ombudsman Officer.
- On February 27, 2003, the Ombudsman wrote to the Mayor requesting a meeting with the Mayor and Council to consider the matter further. The Ombudsman expressed his concern, questioning the City's focus on legal liability as opposed to "*fairness*".
- The City Solicitor responded to the Ombudsman on March 24, 2003, declining the invitation to meet and further explaining the City's position. In particular, the letter addressed the issue of fairness, emphasizing that Mr. M had been treated fairly by the City and that the City has to consider the fairness of its process as it affects all claimants and all taxpayers.
- On June 3, 2003, the Ombudsman responded with another letter to the Mayor advising that he was making a tentative finding that the City's decision to deny Mr. M's claim was related to an arbitrary, unreasonable or unfair procedure and as such, may offend subsection 23(1)(a)(v) of the *Ombudsman Act*, and making a tentative recommendation that the City reconsider its decision to deny Mr. M's claim.
- The City responded to the Ombudsman on June 24, 2003 reiterating its position and pointing out that although the Ombudsman had tentatively found the City's procedure to be arbitrary, unreasonable or unfair, the Ombudsman had not indicated how the City's procedure was arbitrary, unreasonable or unfair.
- The City's Risk Manager met with an Ombudsman Officer on August 28, 2003. A subsequent e-mail confirming their discussions noted that the Ombudsman was not questioning the City's legal opinion and advising that the introduction of a subjective "*fairness*" step in the claims settlement process would make the process inherently unfair.
- On January 7, 2004, the Ombudsman wrote to Mayor and Council and in response to that request Council agreed to hear the Ombudsman as a delegation at an in-camera meeting of Council.
- On February 9, 2004, the Ombudsman met with the Mayor and Council at a Closed Council meeting. After hearing the Ombudsman, Council reconsidered its decision with respect to Mr. M's claim. It reconfirmed the City's claims settlement policy and upheld the previous staff decision to refuse Mr. M's claim.

- On February 11, 2004, the City Clerk advised the Ombudsman in writing of Council's reconsideration of the matter and of its decision.
- On April 27, 2004, the Ombudsman advised the City of his findings and recommendations.

Findings and Recommendations

Your letter of April 27, 2004 sets out the following finding:

> *I find that the City's decision to deny Mr. M's claim is related to an arbitrary, unreasonable and unfair procedure, and, as such, offends subsections 23(1)(a)(v) of the Ombudsman Act.*

You have set out the standards of fairness that you have applied to the investigation and in making your finding at page 9 of your letter, as follows:

> *Arbitrary Procedure (s.23(1)(a)(v))*
>
> *An authority invokes or utilizes an arbitrary procedure when it uses a procedure which fails to adhere to relevant principles of natural justice and which is designed for the mere convenience of the authority or is based on preference or prejudice.*
>
> *Unreasonable Procedure (s.23(1)(a)(v))*
>
> *An unreasonable procedure is one which fails to achieve the purpose for which it was established. This test focuses on the rationale for a procedure and the results it produces or is likely to produce. The term may be seen as a synonym for an incompetent procedure on the basis that such a procedure is an absurdity and thus contrary to reason.*
>
> *Unfair Procedure (s.23(1)(a)(v))*
>
> *Good faith and an open mind are qualities of the decision-maker which are essential to maintaining the integrity of public administration. The decision-maker should not have any "interest in the outcome of the decision nor should s/he show any pre-judgment of the issue to be decided.*

While the City does not take issue with the standards of fairness that have been applied in your investigation, the City disagrees with the conclusions you have reached in applying those standards.

You have concluded that the procedure is arbitrary because, "*The policy appears to have been specifically designed with a limited focus for the mere convenience of the City.*" You have not provided any evidence for this finding.

To the contrary, the City's policy regarding claims is not specifically designed for the mere convenience of the City. It is an appropriate policy that strikes a balance between the competing interests of claimants and taxpayers. A "*convenient*" policy is one in which arbitrary lines are

drawn without regard for the interests of anyone other than the authority. The City does not have a policy of rejecting all claims without first investigating them, hoping that rejected claims are not pursued. That would be an arbitrary procedure. Rather, the City makes an assessment of liability and responds to the claim only after it investigates the circumstances giving rise to the claim and, where appropriate, seeks a legal opinion from in-house counsel as to the City's liability.

In the case of Mr. M , the City fully investigated his claim, which included making inquiries to ascertain whether all equipment used by the City was used properly and appropriately on the day in question. The investigation determined that the City's activities were carried out in accordance with its policies and practices, that all safety measures were taken, and that all equipment was properly used and maintained. The City promptly advised Mr. M of its decision. Further, at Mr. M 's request, the matter was looked at a second time by the Risk Manager who reached the same conclusion.

There is nothing arbitrary in this procedure.

You have also concluded that the City's procedure is unreasonable because it fails to achieve the purpose for which it was established. You have not provided any basis for that conclusion. You have simply stated that while the City's claims settlement policy ensure that all claimants are treated in an equal manner, it does not ensure that all claimants are treated in a fair manner.

In reaching that conclusion, you have made your own assumptions as to what you believe the citizens of Surrey would think was fair. You have noted *"You have failed to convince me that the citizens of Surrey, if found in the same situation as Mr. M and having their glass broken by a City worker using a [weed trimmer], would agree with you that it is fair for the City to decide not to compensate for the cost of repairing the damage".* You have also suggested that the City do the *"neighbourly thing"*, which is to offer to pay the money noting that this is how similar matters could be expected to be resolved between two parties.

In order to suggest what is fair, you have had to make assumptions about what the citizens of Surrey would think or what a neighbourly policy might be. It is the City's belief that this sort of speculation is required in order to implement any sort of *"fairness"* policy. That is why the City's policy is based on objective considerations. Decisions that require speculation and assumption are inherently arbitrary, unreasonable and unfair.

Decisions based upon an objective standard of legal liability are not unreasonable.

You have also found that the City's procedure is unfair because you conclude that City staff has demonstrated a particular bias in the outcome of claims. You have not provided any evidence to substantiate that claim.

To the contrary, the City does not predetermine the outcome of the claims it receives. As discussed above, the City conducts a complete investigation of every claim. If at any point in the investigation is it found that the City is legally responsible for the damages, the City pays for them. The City does not force claimants to go to court if the City's own investigation determines that the City would be legally responsible for the damages.

The investigation of claims prior to its determination of legal liability is fair to claimants and is not a predetermination of the outcome.

We also note that in reaching your findings, you state, "*Unfortunately, Council does not view this as a matter that needs to be resolved*".

Again, to the contrary, the City has gone to great lengths to see that this matter be resolved in its initial investigation of the claim and in its subsequent dealings with your office. However, it appears as though the only manner in which you perceive this will be resolved is if the City pays Mr. M

You have also stated, "*The suggestion that a person should use his or her own insurance to cover damage costs directly related to the actions of the City of Surrey lacks reason*". People carry insurance precisely for situations where damages are suffered by the insurance holder for which no one else is legally responsible.

We also note that you, "*Question the sincerity of the City's suggestion that Mr. M could attempt to remedy the claim in Court, given that the City's Risk Management and legal staff have already clearly taken the position that the City would not be held legally responsible.*"

The City's suggestion that Mr. M could pursue his claim in court is quite sincere. If the City's Risk Management and legal staff are incorrect in their assessment of liability or if the City's investigation has been flawed, then Mr. M does have a remedy available.

Systemic Concerns

You have concluded that the City has an insufficient understanding of the reasonable standards of fairness the public should be able to expect from the City. You state:

> *Another area of systemic concern came to light following the Office of the Ombudsman's suggestion that the City's claims settlement policy be revised to include a standard of fairness that would go beyond simply focusing on legal liability. In response to our suggestion, the City (Mr. C in written correspondence) stated that an additional step in the policy to deal with fairness is a subjective step that "would make the process inherently unfair because it is not possible to apply consistent criteria to a subjective decision making process." ... I fail to see the logic in how introducing a more rigorous standard of fairness in the application of a particular policy would make it inherently unfair.*

With respect, it appears as though you have misapprehended Mr. C's response. He was responding to a suggestion that the City introduce steps that deal with "*the appearance of fairness*". It would be subjective to introduce a step which focused on "*appearance*" and if decisions were made on that basis. Accepting responsibility because the claimant is sympathetic introduces an element of arbitrariness, unreasonableness and unfairness in the process. The City's claim settlement policy would be arbitrary, unreasonable or unfair if it were to settle claims only where the person is sympathetic, persistent, has gone to the media, is irate, is lacking insurance coverage or has made a complaint to the Ombudsman.

The other systemic concern you raise is as follows:

> *As note above, Mr. B indicated in his March 24, 2003 letter, that since Mr. M had been treated in the same manner as any other person in the same situation, the City had acted fairly. In my opinion, if other people in the same situation as Mr. M were treated in the same manner as Mr. M it may be that other people have also been treated in an unfair manner. As indicated earlier in this letter, it is my hope that this is not a large group. Unfortunately, the City has not provided specific clarification to clarify how many citizens of Surrey have been treated in this manner.*

Perhaps you have misunderstood the City's position. The City is not saying that Mr. M has been treated fairly simply because he has been treated in the same manner as any other person in the same situation. Rather, the City is saying that it has a claims settlement policy that is applied to all claims. This policy has been adopted and approved by City Council. It establishes a claims process that is fair and consistent to all, both claimants and City taxpayers, by ensuring that claims are not paid until they are fully investigated and not paid for reasons other than legal liability. It attempts to reach a balance between the competing interests of claimants and taxpayers. This process was followed by the City in responding to Mr. M's claim.

Furthermore, you appear to be drawing some sort of adverse inference against the City by virtue of the fact that it has not provided you with information that you have not requested. The City believes that this is not appropriate.

Further Discussion

You express the role of the Ombudsman as follows:

> *Moreover, the very existence of the **Ombudsman Act** speaks to the government's commitment to provide individuals with the opportunity, in addition to existing provisions such as internal complaints procedures and the Judiciary, to place complaints about the practices of government before this Office. Although your Office conducts investigations with a view to government action or inaction as it relates to the written law, including provisions governing procedure and process, of equal importance is investigation of the action or inaction in view of the unwritten legal principles contained in case law and legal doctrine, which include the principles of, for example, reasonableness, the doctrine of certain duties of care and the requirement to provide reasons for decisions. When considering standards for good governance that contribute to fair public administration, my Office is mandated to apply standards of a broader duty of care, such as is encapsulated under section 23 of the **Ombudsman Act**. This broader duty of care can include, for example, issued such as acting without due delay, supplying individuals with relevant*

> *information, treating people fairly and respectfully, and acting in an unbiased manner.*

We agree completely with this statement of your role. We confirm that you have not found that the City failed to apply principles of reasonableness, that the City has not met its duty of care, or that it has not met the requirement to provide reasons for decisions. There can be no finding that the City acted with any delay, that the City did not provide relevant information, or that the City did not treat Mr. M fairly, respectfully and in an unbiased manner. The crux of this matter is that your standard of fairness does not accord with the City's based only on assumptions you have made about what the taxpayers of the City might expect and how good neighbours will treat each other.

Recommendations

Your letter of April 27, 2004 makes the following recommendations:

> ***That the City reconsiders its decision to deny Mr. M's claim for damage to his property, provides an apology and full financial compensation to Mr. M for his property damage, and undertake to review its policy regarding such complaints in order to ensure that the policy includes a more appropriate standard of fairness.***

The City has already followed your recommendation to undertake to review its policy regarding complaints. Council did so at its meeting of February 9, 2004 after meeting with you.

At that time, Council also reconsidered its decision to deny Mr. M's claim and concluded that the City would not be providing financial compensation to him. We note that this was already the second reconsideration of the City's decision. The City's Risk Manager already reconsidered his claim in October of 2001.

In light of Council's reconsideration, and the conclusion it reached, the City will not be providing Mr. M with an apology.

Your recommendation is that the City's policy include a more "*appropriate*" standard of fairness, although you have been unable to make any suggestions as to what that appropriate standard may be other than what you think a neighbourly policy might be. As stated above, it is the City's belief that a subjective consideration of fairness would only lead to decisions that are arbitrary, unreasonable and unfair. For that reason, it respectfully disagrees with your findings and cannot give any further effect to your recommendations.

Yours sincerely,

D.W. (DOUG) McCALLUM
Mayor

KER:mlg

c.c. City Councillors
City Manager
City Solicitor

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